No. 92-1956

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

JAMES E. GOTTSHALL *and* ALAN CARLISLE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Did the court of appeals err in holding that there is a cause of action under the Federal Employers' Liability Act for negligent infliction of emotional distress that is not generally recognized under the common law?

2. Did the court of appeals err in holding that there is a cause of action under the Federal Employers' Liability Act for negligent infliction of emotional distress arising solely from a plaintiff's general working conditions?

3. Did the court of appeals err in holding that there is a cause of action under the Federal Employers' Liability Act for negligent infliction of emotional distress where the plaintiff neither experiences a physical impact nor reasonably fears the threat of a physical impact?

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIPS

The information concerning the Parties to the Proceeding set forth at page ii of the Petition for a Writ of Certiorari is accurate and is incorporated by reference herein. Since the date of the Petition for a Writ of Certiorari, Consolidated Rail Corporation has become a wholly-owned subsidiary of the publicly held corporation Conrail Inc. Consolidated Rail Corporation presently has an ownership interest in the following companies: The Akron & Barberton Belt Railroad Company; Albany Port Railroad Company; Belt Railroad Company of Chicago; Calumet Western Railway Company; Indiana Harbor Belt Railroad Company; Lakefront Dock & Railroad Terminal Company; Nicholas, Fayette & Greenbrier Railroad Company; Peoria & Pekin Union Railway Company; Pittsburgh, Chartiers & Youghiogheny Railway Company; Railroad Association Insurance, Limited; and TTX Company. Consolidated Rail Corporation does not have an ownership interest in any other company, except for its wholly-owned subsidiaries.

TABLE OF CONTENTS

Page

Questions Presented i

Parties to the Proceeding and Designation of Corporate Relationships ii

Table of Authorities vi

Opinions Below 1

Statement of Jurisdiction 2

Statutory Provision Involved 3

Statement of the Cases 4

A. *Gottshall v. Consolidated Rail Corporation* 4

B. *Carlisle v. Consolidated Rail Corporation* 7

Summary of Argument 8

Argument 12

I. THE FELA DOES NOT PERMIT RECOVERY FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS UPON A BARE SHOWING THAT AN INJURY IS GENUINE AND FORESEEABLE 12

A. The Court of Appeals' Expansive Test Is Inconsistent with the FELA 12

1. The FELA is based on the common law of negligence 12

2. Congress enacted the FELA to address the unusual physical dangers of the railroad industry 16

TABLE OF CONTENTS – (*Continued*)

Page

3. In rejecting the negligence basis of the FELA and in ignoring the FELA's purpose to address the unusual physical dangers of the railroad industry, the court of appeals created an unwarranted test of FELA liability 19

B. The Court of Appeals' Expansive Test Allows Liability Under the FELA for Matters Involving a Railroad Employee's General Working Conditions That More Properly Are Addressed Under the Railway Labor Act .. 27

C. The Court of Appeals' Expansive Test Allows a Broader Recovery for Negligent Infliction of Emotional Distress Under the FELA Than That Allowed by Any Other Court of Appeals to Have Considered the Issue..... 31

II. LIMITING RECOVERY FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS UNDER THE FELA TO SITUATIONS IN WHICH THE PLAINTIFF EXPERIENCES A PHYSICAL IMPACT OR REASONABLY FEARS THE THREAT OF A PHYSICAL IMPACT STRIKES THE MOST APPROPRIATE BALANCE AMONG THE VARIOUS POLICIES AND INTERESTS AT STAKE..... 33

A. The Zone of Danger Test Is the Common Law Test That Is Most Consistent With the FELA..... 34

B. The Development of the Common Law Demonstrates That the Zone of Danger Test Is the Fairest and Most Workable of the Common Law Tests..... 38

TABLE OF CONTENTS – (*Continued*)

Page

C. Neither Gottshall Nor Carlisle Has a Compensable Injury Under the FELA Because Neither Experienced a Physical Impact or Reasonably Feared the Threat of a Physical Impact..... 42

Conclusion 43

Appendix: Common Law Negligent Infliction of Emotional Distress Cases..... 45

TABLE OF AUTHORITIES

Page

Cases

Adams v. CSX Transp., Inc., 899 F.2d 536 (6th Cir. 1990) 25, 32

Allen v. Walker, 569 So. 2d 350 (Ala. 1990) 21

American R.R. v. Didricksen, 227 U.S. 145 (1913) 15

Archibald v. Braverman, 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (1969) 39

Atchison, Topeka & Santa Fe Ry. v. Buell, 480 U.S. 557 (1987) ..... *passim*

Burgess v. Superior Court, 2 Cal. 4th 1064, 831 P.2d 1197, 9 Cal. Rptr. 2d 615 (1992) 21

Cameron v. Pepin, 610 A.2d 279 (Me. 1992) 40

Campbell v. Animal Quarantine Station, 63 Haw. 557, 632 P.2d 1066 (1981) 21

Caputzal v. Lindsay Co., 48 N.J. 69, 222 A.2d 513 (1966) 25

Chesapeake & Ohio Ry. v. Stapleton, 279 U.S. 587 (1929) 15

Chicago Bd. of Educ. v. Industrial Comm'n, 169 Ill. App. 3d 459, 523 N.E.2d 912, 120 Ill. Dec. 1, *appeal denied*, 122 Ill. 2d 571, 530 N.E.2d 241, 125 Ill. Dec. 213 (1988) 26

TABLE OF AUTHORITIES – (*Continued*)

Page

Consolidated Rail Corp. v. Railway Labor Executives' Ass'n, 491 U.S. 299 (1989) 27

Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106 (1974) 34-35

Corgan v. Muehling, 143 Ill. 2d 296, 574 N.E.2d 602, 158 Ill. Dec. 489 (1991) 21

Crane v. Cedar Rapids & Iowa City Ry., 395 U.S. 164 (1969) 15

Detroit & Toledo Shore Line R.R. v. Transportation Union, 396 U.S. 142 (1969) 27

Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) 39

Elliott v. Norfolk & W. Ry., 910 F.2d 1224 (4th Cir. 1990) 25, 32

Ellis v. Union Pac. R.R., 329 U.S. 649 (1947) 13

Farmer v. United Bhd. of Carpenters, Local 25, 430 U.S. 290 (1977) 28

Feldleit v. Long Island R.R., 723 F. Supp. 892 (E.D.N.Y. 1989) 30

Gain v. Carroll Mill Co., 114 Wash. 2d 254, 787 P.2d 553 (1990) 40

Gaston v. Flowers Transp., 866 F.2d 816 (5th Cir. 1989) 19, 24, 31, 36-37, 42

Graves v. Utah Power & Light Co., 713 P.2d 187 (Wyo. 1986) 26

TABLE OF AUTHORITIES – (*Continued*)

Page

Gulf, Colorado & Santa Fe Ry. v. McGinnis, 228 U.S. 173 (1913) 14

Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952) 34-35

Hammond v. Terminal R.R. Ass'n, 848 F.2d 95 (7th Cir. 1988), *cert. denied*, 489 U.S. 1032 (1989) 31

Herdman v. Pennsylvania R.R., 352 U.S. 518 (1957) 14

Holliday v. Consolidated Rail Corp., 914 F.2d 421 (3d Cir. 1990), *cert. denied*, 498 U.S. 1090 (1991).... 29-30, 31

Inman v. Baltimore & Ohio R.R., 361 U.S. 138 (1959) 13

Jackson v. Consolidated Rail Corp., 717 F.2d 1045 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984) 30

Jackson v. Liberty Mut. Ins. Co., 580 S.W.2d 70 (Tex. Ct. App. 1979) 26

Jensen v. New Mexico State Police, 109 N.M. 626, 788 P.2d 382 (Ct. App.), *cert. denied*, 109 N.M. 563, 787 P.2d 1246 (1990) 26

Johnson v. Southern Pac. Co., 196 U.S. 1 (1904) 17

Kelley v. Kokua Sales & Supply, Ltd., 56 Haw. 204, 532 P.2d 673 (1975) 41

Kelley v. Southern Pac. Co., 419 U.S. 318 (1974)..... 15

Kernan v. American Dredging Co., 355 U.S. 426 (1958) 13, 15-16, 34

TABLE OF AUTHORITIES – (*Continued*)

Page

Kulavic v. Chicago & Illinois Midland Ry., 1 F.3d 507 (7th Cir. 1993) 30

Lancaster v. Norfolk & W. Ry., 773 F.2d 807 (7th Cir. 1985), *cert. denied*, 480 U.S. 945 (1987).....25, 35

Ledger v. Tippitt, 164 Cal. App. 3d 625, 210 Cal. Rptr. 814 (1985) 39

Lewy v. Southern Pac. Transp. Co., 799 F.2d 1281 (9th Cir. 1986) 30

Maloney v. Conroy, 208 Conn. 392, 545 A.2d 1059 (1988) 20

Mechanics Lumber Co. v. Smith, 296 Ark. 285, 752 S.W.2d 763 (1988)..... 21

Melanson v. United Air Lines, 931 F.2d 588 (9th Cir.), *cert. denied*, 112 S. Ct. 189 (1991) 29

Michigan Cent. R.R. v. Vreeland, 227 U.S. 59 (1913) 14

Milam v. Herrlin, 819 F. Supp. 295 (S.D.N.Y. 1993) 30

Miles v. Apex Marine Corp., 498 U.S. 19 (1990) 14, 35

Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960) 19

Monessen Southwestern Ry. v. Morgan, 486 U.S. 330 (1988) 14

Moody v. Maine Cent. R.R., 823 F.2d 693 (1st Cir. 1987)..... 32

Newton v. Kaiser Foundation Hosps., 184 Cal. App. 3d 386, 228 Cal. Rptr. 890 (1986)..... 40

Northern Sec. Co. v. United States, 193 U.S. 197 (1904) 10

TABLE OF AUTHORITIES – (*Continued*)

Page

Outten v. National R.R. Passenger Corp., 928 F.2d 74 (3d Cir. 1991) 31

Pennsylvania R.R. v. O'Rourke, 344 U.S. 334 (1953) 15

Pierce v. Southern Pac. Transp. Co., 823 F.2d 1366 (9th Cir. 1987) 32

Plaisance v. Texaco, Inc., 937 F.2d 1004 (5th Cir. 1991), *on rehearing*, 966 F.2d 166 (5th Cir.) *(en banc), cert. denied*, 113 S. Ct. 604 (1992) 31, 37-38

Poller v. Columbia Broadcasting Sys., 368 U.S. 464 (1962) 4

Puthe v. Exxon Shipping Co., 2 F.3d 480 (2d Cir. 1993) 19, 32

Ray v. Consolidated Rail Corp., 938 F.2d 704 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 914 (1992) 31

Reynolds v. Atlantic Coast Line Ry., 336 U.S. 207 (1949) 14

Rickey v. Chicago Transit Auth., 98 Ill. 2d 546, 457 N.E.2d 1, 75 Ill. Dec. 211 (1983) 41

Robert v. Consolidated Rail Corp., 832 F.2d 3 (1st Cir. 1987) 32

Rodrigues v. State, 52 Haw. 156, 472 P.2d 509 (1970) 21, 41

Rogers v. Missouri Pac. R.R., 352 U.S. 500 (1957) .. 15-16

Sloss v. Industrial Comm'n, 121 Ariz. 10, 588 P.2d 303 (1978) 26

Stadler v. Cross, 295 N.W.2d 552 (Minn. 1980)..... 41

Stoklosa v. Consolidated Rail Corp., 864 F.2d 425 (6th Cir. 1988) 25, 32

TABLE OF AUTHORITIES – (*Continued*)

Page

Taylor v. Burlington N. R.R., 787 F.2d 1309 (9th Cir. 1986) 32

Thing v. La Chusa, 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989) 21, 22, 40

Tiller v. Atlantic Coast Line R.R., 318 U.S. 54 (1943) 18

Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969) 40-41

United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947) 42

Urie v. Thompson, 337 U.S. 163 (1949).....12, 16

Ward v. Atlantic Coast Line R.R., 362 U.S. 396 (1960) 15

Wilkerson v. McCarthy, 336 U.S. 53 (1949).....13, 18

Williams v. Baker, 572 A.2d 1062 (D.C. 1990)..... 41

Williamson v. Bennett, 251 N.C. 498, 112 S.E.2d 48 (1960) 25

Statutes and Rules

28 U.S.C. § 1254 2

28 U.S.C. § 1331 5

45 U.S.C. § 51 .....3, 12, 13, 17, 34

45 U.S.C. § 53 .....13, 34

45 U.S.C. § 54 .....13, 34

45 U.S.C. § 55 .....13, 34

45 U.S.C. § 151 *et seq.* 27

45 U.S.C. § 153 27

TABLE OF AUTHORITIES – (*Continued*)

Page

46 U.S.C. § 688 19

Supreme Court Rule 12.2 2

Legislative Materials

H.R. Rep. No. 1386, 60th Cong., 1st Sess. (1908) 17-18, 34

H.R. Rep. No. 1222, 76th Cong., 1st Sess. (1939)..... 13

S. Rep. No. 460, 60th Cong., 1st Sess. (1908) 18

S. Rep. No. 432, 61st Cong., 2d Sess. (1910).....17, 18

42 Cong. Rec. 4434-35 (1908)..... 17

42 Cong. Rec. 4527 (1908)..... 17

42 Cong. Rec. 4532 (1908)..... 17

42 Cong. Rec. 4541 (1908)..... 17

42 Cong. Rec. 4604 (1908)..... 17

42 Cong. Rec. 4607 (1908)..... 17

136 Cong. Rec. H10104 (daily ed. Oct. 17, 1990)..... 35

136 Cong. Rec. S15553 (daily ed. Oct. 17, 1990) 35

Hearings on the Federal Employers' Liability Act Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce, 101st Cong., 1st Sess. (1989)..... 35

TABLE OF AUTHORITIES – (*Continued*)

Page

Other Authorities

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Prosser, *Palsgraf Revisited*, 52 Mich. L. Rev. 1 (1953) 22

Restatement (Second) of Torts § 46 (1965) 29

Restatement (Second) of Torts § 436A comment b (1965) 20

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BRIEF FOR PETITIONER

OPINIONS BELOW

In *Gottshall v. Consolidated Rail Corporation*, the opinion of the United States District Court for the Eastern District of Pennsylvania (A-91 to A-105)[1] is reported at

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[1] References to the Appendix to the Petition for a Writ of Certiorari are designated "A-___." References to the Joint Appendix filed concurrently with this Brief are designated "JA-___." References to the Joint Appendix filed in the court of appeals in *Gottshall* are designated "GR-___." References to the Joint Appendix filed in the court of appeals in *Carlisle* are designated "CR-___."

773 F. Supp. 778 (E.D. Pa. 1991). The opinion of the United States Court of Appeals for the Third Circuit (A-1 to A-72) is reported at 988 F.2d 355 (3d Cir. 1993). The order of the court of appeals denying the petition for rehearing and suggestion of rehearing in banc (A-146 to A-147) also is reported at 988 F.2d 355 (3d Cir. 1993).

In *Carlisle v. Consolidated Rail Corporation*, the opinion of the United States District Court for the Eastern District of Pennsylvania denying Consolidated Rail Corporation's motion for summary judgment (A-106 to A-114) was not officially reported. The district court opinion denying Consolidated Rail Corporation's motion for judgment notwithstanding the verdict or for a new trial (A-115 to A-145) is reported at 790 F. Supp. 521 (E.D. Pa. 1992). The opinion of the United States Court of Appeals for the Third Circuit (A-73 to A-90) is reported at 990 F.2d 90 (3d Cir. 1993).

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The judgment of the court of appeals in *Gottshall v. Consolidated Rail Corporation* was entered on February 8, 1993. The order denying the petition for rehearing and suggestion of rehearing in banc was entered on March 11, 1993. The judgment of the court of appeals in *Carlisle v. Consolidated Rail Corporation* was entered on March 29, 1993. The single petition for a writ of certiorari under Supreme Court Rule 12.2 was filed on June 9, 1993, and the petition for a writ of certiorari was granted on October 12, 1993.

STATUTORY PROVISION INVOLVED

The Federal Employers' Liability Act, 45 U.S.C. § 51, provides:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

STATEMENT OF THE CASES

A. *Gottshall v. Consolidated Rail Corporation*[2]

On a hot day in August 1988, a Consolidated Rail Corporation ("Conrail") work gang was replacing a defective rail track in a remote area near Turbotville, Pennsylvania (A-2). Because of the time pressure, the workers were discouraged from taking scheduled work breaks, although breaks were permitted and water was available as needed (A-3). After several hours, one worker, Richard Johns, had a heart attack (*id.*). The supervisor was unable to radio for help because Conrail temporarily had taken the communications base station off the air for repairs without informing the work gang (A-4). While the supervisor drove for help, another worker, respondent James Gottshall, one of Johns' friends, tried without success to resuscitate Johns (A-3 to A-4). Johns died before the paramedics arrived (A-4). After the paramedics arrived, at their instruction, Johns' body was covered and remained on the scene until the coroner arrived (A-4, A-93). The workers were ordered back to work (A-4).

Gottshall, thirty-four years old, who had worked for Conrail for fifteen years (GR-77), was extremely upset by the incident (A-5). For several days he returned to work, but then, fearing that he, too, would have a heart attack, told his supervisor that he could no longer endure the hot weather conditions and his exhaustion, went home,

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[2] The court of appeals in *Gottshall* was reviewing the district court's grant of summary judgment for Conrail. Accordingly, for purposes of this Brief, Conrail will assume the facts in the light most favorable to the plaintiff. *See Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464, 473 (1962).

secluded himself in his basement, and subsequently spent three weeks as an in-patient at a psychiatric institution (A-6). Gottshall experienced physical symptoms of emotional distress, including anxiety, insomnia, cold sweats, loss of appetite, nausea, weakness, nightmares, a fear of leaving home, and weight-loss (*id.*). He was diagnosed as suffering from major depression and post-traumatic stress disorder (*id.*).

Gottshall brought an action in the District Court for the Eastern District of Pennsylvania under the Federal Employers' Liability Act ("FELA") against Conrail for negligent infliction of emotional distress (*see* JA-4 to JA-5). Gottshall claimed that Conrail's management decisions were negligent, alleging that "[p]laintiff was injured when he was required to work extensive overtime under extremely hot weather conditions, coupled with the death on the job of a fellow employee" (JA-5). Federal jurisdiction was based on 28 U.S.C. § 1331.

The district court granted Conrail's motion for summary judgment (A-91 to A-105). It held that Gottshall's claims did not give rise to a cause of action for negligent infliction of emotional distress under any accepted common law theory (A-97 to A-100), and, furthermore, that it did not satisfy the general common law tort requirements of foreseeability, cause in fact, and proximate cause (A-100 to A-105).

The court of appeals reversed in a 2-1 decision (A-1 to A-72). Judge Roth, in dissent, stated that Conrail did not breach a duty to Gottshall and could not have foreseen Gottshall's injury (A-66).

The majority acknowledged that Gottshall's claim for negligent infliction of emotional distress would not be cognizable under the common law because it did not fall

within the traditional common law "physical impact," "zone of danger," or "bystander" tests developed by the common law courts to delimit liability for emotional distress claims (A-29 to A-30). Nevertheless, the court held that Gottshall had stated a claim under the FELA. In so holding, the majority developed a new and expansive test for liability for negligent infliction of emotional distress under the FELA, emphasizing that the "issue is whether the factual circumstances . . . provide a threshold assurance that there is a likelihood of genuine and severe emotional injury" (A-35). If so, then as long as the emotional distress claim satisfies the general physical injury tort requirements of breach of duty, injury, and causation, it will be cognizable.

In permitting recovery for an emotional distress claim not recognizable under common law, the court reasoned that: (1) the predominant purpose of the FELA is to assure a liberal recovery for all injured employees (A-25 to A-31); (2) the sole purpose of the common law tests for negligent infliction of emotional distress is "to glean the meritorious from the feigned and frivolous" (A-31); (3) "in many ways FELA is the antithesis of the common law" (A-29), and, accordingly, "doctrinal common law distinctions are to be discarded when they bar recovery on meritorious FELA claims" (A-30); and (4) therefore, there exists a cause of action for negligent infliction of emotional distress under the FELA that is not generally recognized under the common law.

The result of the court's reasoning was that Gottshall, who clearly would not be able to recover under any common law test for negligent infliction of emotional distress, could recover under the FELA. The breadth of

the holding is best illustrated by its very first application – *Carlisle v. Consolidated Rail Corporation*.

B. *Carlisle v. Consolidated Rail Corporation*

Alan Carlisle was a Conrail train dispatcher and then a supervisor of rail operations from 1976 until 1988 (A-74). In 1984, Conrail reduced its work force, which in turn increased the amount of work for which Carlisle was responsible (*id.*). In addition, some of the equipment with which he worked was outdated and functioned poorly (*id.*). In 1988, Carlisle became a trainmaster, although he still worked at times as a supervisor and dispatcher and retained many of his former responsibilities (*id.*). Carlisle experienced stress from the demands of his job, which he alleged caused insomnia, fatigue, headaches, depression, sleepwalking, and weight-loss. During one period, according to Carlisle's testimony, he worked twelve to fifteen hour shifts for fifteen days (A-75). Carlisle eventually had a nervous breakdown (*id.*).

Carlisle brought an action in the District Court for the Eastern District of Pennsylvania under the FELA against Conrail for negligent infliction of emotional distress (*see* JA-15 to JA-17). Federal jurisdiction was based on 28 U.S.C. § 1331.

The district court denied Conrail's motion for summary judgment (A-106 to A-114). The jury returned a verdict for Carlisle for $386,500, and the district court denied Conrail's motion for judgment notwithstanding the verdict or for a new trial (A-115 to A-145).

The court of appeals affirmed (A-73 to A-90). Characterizing its decision in *Gottshall* as "for the first time up[holding] recovery under the FELA for negligent infliction of emotional distress without proof of any physical impact, under circumstances where the emotional distress

was accompanied by physical manifestations" (A-84), the court in *Carlisle* construed the issue before it as whether "protracted exposure to work-related, stressfully injurious conditions [can] lead to liability under the FELA" (A-87).

On the basis of the expansive test adopted in *Gottshall*, the court of appeals held that it was "reasonably foreseeable that extended exposure to dangerous and stressful working conditions [would] cause injury to [Carlisle]" (A-88 to A-89). In so holding, the court relied on the facts that (1) Carlisle and his co-workers had complained to Conrail about stresses caused by their working conditions, and several co-workers had filed FELA actions against Conrail for emotional distress (A-87 to A-88); and (2) the Federal Railway Administration had issued two reports, one that documented the stressful nature of a train dispatcher's job and one that criticized the outdated equipment and working conditions at Conrail's dispatching office (A-88).

SUMMARY OF ARGUMENT

These two cases call upon this Court to determine whether a railroad employer owes a broader duty under the FELA to protect its employees from negligent infliction of emotional distress than exists under the common law. In *Atchison, Topeka & Santa Fe Ry. v. Buell*, 480 U.S. 557, 568 (1987), this Court left open the question of what circumstances may give rise to a cause of action for negligent infliction of emotional distress under the FELA, directing the lower courts to "glean[] guidance from common-law developments" in ascertaining whether in any particular case such a cause of action would be cognizable.

In addition to the general physical injury tort requirements of breach of duty, injury, and causation, the common law imposes one of the following threshold requirements on recovery for negligent infliction of emotional distress: (1) that a plaintiff experience an actual physical impact ("the physical impact test"); (2) that a plaintiff either experience or reasonably fear the threat of a physical impact ("the zone of danger test"); or (3) that a plaintiff contemporaneously witness harm to an immediate family member from a physical impact ("the relative bystander test"). It does so because of concerns that, unlike physical injury claims, emotional distress claims can extend without limit; damages for emotional injuries often are incalculable; trivial emotional upsets are not the proper subject for the tort system; and there must be some assurance of genuineness of emotional distress claims.

The court of appeals here disavowed these common law tests, relying upon what it identified as the broad remedial purposes of the FELA to allow a cause of action for negligent infliction of emotional distress whenever an injury has "indicia of genuineness" and satisfies the general tort requirements of breach of duty, injury, and causation.

However, the test adopted in *Gottshall* and applied in *Carlisle* transforms the FELA into a full recovery, general foreseeability statute in contravention of the purpose of the FELA, the applicable precedents of this Court, and the decisions of every other court of appeals to have considered the issue. Contrary to the court of appeals' conclusions, the FELA is a negligence statute, with its roots in the common law, enacted to address the unusual physical dangers of the railroad industry.

Moreover, the court of appeals' expansive test ignores the Railway Labor Act ("RLA") and other ways that employees negotiate their working conditions. Although this Court held in *Buell* that the jurisdiction of the RLA does not determine whether a railroad worker's claims of intentional harassment are compensable under the FELA, remedies under the RLA nonetheless should be considered in determining the scope of emotional distress claims that arise from the railroad's alleged negligence in matters involving ordinary working conditions – such as hours of work, location of work, amount of work, and number of work breaks – that are at the heart of the RLA's elaborate arbitration and collective bargaining scheme.

Perhaps the reason that the court of appeals went so far astray in these cases can be found in the famous admonition of Justice Holmes:

> Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

Northern Sec. Co. v. United States, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting).

Certainly, the facts in *Gottshall* troubled the court of appeals. However, a desire to compensate a single plaintiff does not justify bending settled principles of law to allow a cause of action for negligent infliction of emotional distress that is unprecedented under either the

FELA or the common law – and that is so broad it permits the very next plaintiff, Carlisle, to recover for stress caused by the ordinary working conditions of his job.

In determining the contours of an employer's duty with respect to emotional distress claims under the FELA, this Court must balance a number of policy considerations, including the negligence basis of the FELA; the purposes of the FELA; the congressional concern in enacting the FELA with addressing the unusual physical dangers of the railroad industry; the established procedures of the RLA that require railroad working conditions to be established through negotiation between management and labor; the potential for incalculable and unlimited damages for emotional distress, especially in view of the unique susceptibilities of each individual; and the danger of fraudulent emotional injury claims.

In balancing these policy considerations, recovery for negligent infliction of emotional distress under the FELA should be limited to situations that satisfy the common law threshold requirement that the plaintiff either experience an actual physical impact or reasonably fear the threat of a physical impact – a requirement not satisfied in either *Gottshall* or *Carlisle*. This "zone of danger" test, a widely-accepted, "middle-ground" test under the common law, best accords with the FELA's remedial purpose while recognizing the unusual physical dangers of the railroad industry with which Congress was concerned when it enacted the FELA. Moreover, the development of the common law makes clear that the zone of danger test is workable and just and strikes the most appropriate balance among the various policy considerations at stake.

ARGUMENT

I. THE FELA DOES NOT PERMIT RECOVERY FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS UPON A BARE SHOWING THAT AN INJURY IS GENUINE AND FORESEEABLE.

A. The Court Of Appeals' Expansive Test Is Inconsistent with the FELA.

The FELA is firmly grounded in the common law of negligence. While it is true that the FELA is a broad remedial statute, *see, e.g., Urie v. Thompson*, 337 U.S. 163, 181 (1949), it was enacted to address the unusual physical dangers of the railroad industry, not to compensate railroad workers for emotional injuries caused by ordinary working conditions divorced from those extraordinary physical dangers.

It is these two fundaments of the FELA – that it is based in the common law of negligence and that it was enacted to address the unusual physical dangers of the railroad industry – that the court of appeals in *Gottshall* and *Carlisle* disregarded in adopting its general foreseeability test for negligent infliction of emotional distress claims.

1. The FELA is based on the common law of negligence.

The operative provision of the FELA provides: "Every common carrier . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the *negligence* of any . . . such carrier. . . . " 45 U.S.C. § 51 (emphasis added). The FELA changed the common law liability of railroad employers to their employees by (1) abolishing the fellow servant rule; (2) rejecting the doctrine of contributory negligence in favor

of comparative negligence; and (3) prohibiting an employer from exempting itself by contract from the FELA. *See* 45 U.S.C. §§ 51, 53-55; H.R. Rep. No. 1386, 60th Cong., 1st Sess. 1 (1908). In 1939, Congress amended the FELA to eliminate the defense of assumption of risk. *See* H.R. Rep. No. 1222, 76th Cong., 1st Sess. (1939).

However, liability under the FELA always was and continues to be based on the common law principle of negligence, "the breach of some duty found to rest upon the employer," W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser & Keeton on Torts* § 80 at 578 (5th ed. 1984), and not solely on the fact that "genuine" injuries have occurred. In this sense, the FELA preserved common law negligence principles with the specific statutory modifications listed above. As this Court repeatedly has recognized, the FELA is founded on negligence principles and is neither an insurance nor a no-fault statute equivalent to a workers' compensation scheme. *See, e.g., Inman v. Baltimore & Ohio R.R.*, 361 U.S. 138, 140 (1959); *Wilkerson v. McCarthy*, 336 U.S. 53, 61 (1949); *Ellis v. Union Pac. R.R.*, 329 U.S. 649, 653 (1947); *see also Kernan v. American Dredging Co.*, 355 U.S. 426, 432 (1958) ("The FELA . . . impose[s] upon the employer the duty of paying damages when injury to the worker is caused, in whole or in part, by the employer's fault").

In *Atchison, Topeka & Santa Fe Ry. v. Buell*, 480 U.S. 557 (1987), this Court was asked for the first time to decide whether a cause of action for emotional injury is cognizable under the FELA. Although the Court found the record insufficiently developed to decide whether the scope of the FELA includes emotional injury claims, it directed the lower courts to "glean[] guidance from common-law developments" in ascertaining whether in any particular case, such a cause of action would be available. *Id.* at 568.

This Court's emphasis in *Buell* on the common law basis of the FELA is consistent with its general FELA jurisprudence. While consistently reaffirming the broad remedial purpose of the FELA, the Court has rejected attempts such as those by the court of appeals in these two cases to (1) abandon the negligence standard of the FELA in the name of the statute's broad remedial purpose; and (2) compensate railroad workers for the ordinary dangers of railroading. *See, e.g., Herdman v. Pennsylvania R.R.*, 352 U.S. 518, 520 (1957); *Reynolds v. Atlantic Coast Line Ry.*, 336 U.S. 207, 208 (1949).

As a general matter, the history of FELA interpretation by this Court is not one of constantly increasing remedies for plaintiffs beyond the limitations of the common law, as the court of appeals' opinions would lead one to believe. *See, e.g., Gottshall*, App. at A-29 ("in many ways FELA is the antithesis of the common law"); *id.* at A-30 ("doctrinal common law distinctions are to be discarded when they bar recovery on meritorious FELA claims").

To the contrary, this Court repeatedly has emphasized that the FELA is rooted in the common law. *See, e.g., Monessen Southwestern Ry. v. Morgan*, 486 U.S. 330, 337-39 (1988) (no right to prejudgment interest under the FELA because Congress did not expressly provide for such damages and such damages did not exist at common law at the time the FELA was enacted); *Michigan Cent. R.R. v. Vreeland*, 227 U.S. 59, 69-71 (1913) (limiting available damages in FELA wrongful death actions to pecuniary losses because only pecuniary damages for wrongful death are available at common law); *see also Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (following *Vreeland* in the context of a Jones Act suit); *Gulf, Colorado & Santa Fe Ry. v. McGinnis*, 228 U.S. 173, 176 (1913) (reiterating that

damages under the FELA are limited to pecuniary losses); *American R.R. v. Didricksen*, 227 U.S. 145, 182 (1913) (same); *cf. Urie*, 337 U.S. at 182 (recognizing that if occupational diseases were not compensable at common law, it would "lend substance to the argument" that they should not be compensable under the FELA).[3]

Furthermore, the three decisions of this Court upon which the court of appeals relied do not support imposing a duty on FELA employers that is not generally recognized at common law. In *Rogers v. Missouri Pacific R.R.*, 352 U.S. 500, 506 (1957), this Court concluded that where "the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought," the question of negligence is for the jury. In *Kernan*, 355 U.S. at 438-39, the Court held that the plaintiff could assert a negligence *per se* theory even though the regulation violated (requiring navigation lights to be set at a certain height above the water) was not designed

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[3] This Court has declined to expand the FELA in other respects. *See, e.g., Kelley v. Southern Pac. Co.*, 419 U.S. 318, 323 (1974) (employee of motor carrier that was agent of railroad not covered by the FELA); *Crane v. Cedar Rapids & Iowa City Ry.*, 395 U.S. 164, 166-67 (1969) (railroad has contributory negligence defense in suit by nonemployee working on train even though defense would not be available if one of railroad's employees working on same train brought suit under the FELA); *Ward v. Atlantic Coast Line R.R.*, 362 U.S. 396, 397-98 (1960) (company that repaired tracks for railroad not agent of railroad under the FELA); *Pennsylvania R.R. v. O'Rourke*, 344 U.S. 334, 341-42 (1953) (brakeman injured while aboard car float on navigable waters not covered by the FELA); *Chesapeake & Ohio Ry. v. Stapleton*, 279 U.S. 587, 597 (1929) (violation of state child labor law not negligence under the FELA).

to prevent the type of harm that resulted (an explosion caused by a navigation light placed too close to the water that was coated by flammable petroleum products). In *Urie*, 337 U.S. at 181-82, this Court held that an employee could recover for silicosis, an occupational disease, even though the employee's physical injury was the result of long-term exposure and not of a sudden traumatic accident.

Thus, these cases did not eliminate the common law negligence analysis, but only made it easier for a plaintiff to plead a traditional negligence case: *Rogers* relaxed concepts of causation under the FELA; *Kernan* relaxed a technical restriction on principles of negligence *per se*; and *Urie* included occupational disease as a compensable physical injury. While these decisions speak of liberal recovery under the FELA, they do not reject common law negligence principles as do the *Gottshall* and *Carlisle* decisions.

This Court's precedents do not suggest that any railroad employee alleging any kind of injury may automatically recover as long as the injury is genuine and foreseeable. Likewise, they do not support a holding that railroads owe a broader duty to protect their employees from negligent infliction of emotional distress than exists under the common law. And they do not hold that employees like Gottshall and Carlisle may recover for emotional injury caused by the day-to-day stresses of their employment.

2. Congress enacted the FELA to address the unusual physical dangers of the railroad industry.

The emphasis of the FELA is on physical injuries and death. The FELA creates liability for "injury or death

resulting in whole or in part from the negligence" of common carriers. 45 U.S.C. § 51. At the turn of the century when the FELA was enacted, railroad workers were experiencing serious physical injuries and death at an alarming rate. S. Rep. No. 432, 61st Cong., 2d Sess. 2 (1910).[4] Indeed, in 1889, President Harrison told Congress " '[i]t is a reproach to our civilization that any class of American workmen, should in the pursuit of a necessary and useful vocation, be subjected to a peril of life and limb as great as that of a soldier in time of war.' " Griffith, *The Vindication of a National Public Policy Under the Federal Employers' Liability Act*, 18 Law & Contemp. Probs. 160, 162-66 (1953) (citing *Johnson v. Southern Pac. Co.*, 196 U.S. 1, 19 (1904)). In urging Congress to enact the FELA, President Roosevelt condemned placing "the entire burden of the loss of life or limb upon the victim or the victim's family." S. Rep. No. 432, 61st Cong., 2d Sess. 2 (1910).

Thus, the Committee Report accompanying the House Bill emphasized that the FELA would make the employer "liable for injury caused by defects or insufficiencies in the roadbed, tracks, engines, machinery, and

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[4] In 1908, the total casualties to trainmen on interstate railroads were 281,645. S. Rep. No. 432, 61st Cong., 2d Sess. 2 (1910). In the congressional debates, the members of the House of Representatives spoke generally of injuries and deaths caused by defects in machinery, *see, e.g.*, 42 Cong. Rec. 4434-35 (1908) (remarks of Rep. Clayton); of the serious injuries and loss of human life on the railroads, *see, e.g., id.* at 4607 (remarks of Rep. Flood); and of injuries and deaths caused by train wrecks, *see, e.g., id.* at 4604 (remarks of Rep. Driscoll). Similarly, the discussion in the Senate centered on defects in machinery, *see, e.g., id.* at 4527, 4532 (remarks of Sen. Dolliver); and injuries and deaths caused in the course of operating a train, *see, e.g., id.* at 4541 (remarks of Sen. Beveridge).

other appliances used in the operation of railroads." H.R. Rep. No. 1386, 60th Cong., 1st Sess. 2 (1908). Similarly, the Senate Report centered on the "dangers of . . . employment and defects in machinery" and deplored "leaving the workman to take the risk of all dangers incident to unguarded machinery." S. Rep. No. 460, 60th Cong., 1st Sess. 2 (1908).

In a later report to Congress, Senator Borah of the Judiciary Committee described the FELA as a statute that:

> places such stringent liability upon the railroads for injuries to their employees as to compel the highest safeguarding of the lives and limbs of the men in this dangerous employment. The tremendous loss of life and limb on the railroads of this country is appalling.

S. Rep. No. 432, 61st Cong., 2d Sess. 2 (1910); *see also Wilkerson*, 336 U.S. at 68 (Douglas, J., concurring) (FELA enacted to "put on the railroad industry some of the cost for the legs, eyes, arms and lives which it consumed in its operations"); *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54, 59 n.4, 65 & n.21 (1943).

This history reinforces the words of the statute and demonstrates that in enacting the FELA, Congress was concerned with the physical dangers of the railroad industry and with the severe injuries – and deaths – resulting therefrom. The statute was not intended to reach emotional injuries resulting from a railroad employee's ordinary working conditions. While the remedy provided by the FELA is not expressly or immutably tied to the precise injuries contemplated by Congress in enacting the statute, the original concerns of Congress should not be ignored, as they were by the court of appeals, which in effect created a remedy for the ordinary rigors and stresses of railroad work.

As the Court of Appeals for the Second Circuit recently explained in affirming the dismissal of an emotional distress claim under the Jones Act,[5] in terms equally applicable here:

> Although Exxon had a duty to provide a reasonably safe workplace, Exxon had no duty to keep Puthe safe from the rigors of a job as a seaman. Puthe's allegations refer to seemingly common occurrences for seamen. It appears obvious to this Court that seamen must expect to encounter certain dangers on the job and to work during adverse weather conditions. They have "knowingly and voluntarily chosen callings which . . . involve braving certain hazards and are traditionally not well suited to the squeamish or faint-hearted." If seamen were excused from working on deck during high seas and cold winds, the ocean would be filled with crewless boats.

Puthe v. Exxon Shipping Co., 2 F.3d 480, 483 (2d Cir. 1993) (citation omitted) (quoting *Gaston v. Flowers Transp.*, 866 F.2d 816, 820 (5th Cir. 1989)).

3. In rejecting the negligence basis of the FELA and in ignoring the FELA's purpose to address the unusual physical dangers of the railroad industry, the court of appeals created an unwarranted test of FELA liability.

In *Gottshall* and *Carlisle*, the court of appeals ignored the negligence basis of the FELA and the purpose of the statute to provide a remedy for the unusual physical dangers of railroad work. The court of appeals' radical

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[5] The Jones Act incorporates the negligence standards and the remedies of the FELA. *See* 46 U.S.C. § 688; *see also Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 547 (1960).

departure from common law negligence principles is evident from its explicit rejection of the common law tests for negligent infliction of emotional distress; its focus on the "genuineness" of a plaintiff's claim rather than on a defendant's fault; its application of general tort principles that elevates "foreseeability" above all other elements; and the fact that Gottshall and Carlisle in all likelihood could not recover workers' compensation under the no-fault workers' compensation schemes of many states.

Common law courts historically have been wary of imposing liability for emotional distress due to a fear of: (1) potentially unlimited claims; (2) incalculable damages; (3) a flood of litigation brought by those with trivial or intangible emotional distress claims; and (4) fraudulent claims. *See, e.g., Maloney v. Conroy*, 208 Conn. 392, 397-98, 545 A.2d 1059, 1061-62 (1988). *See generally Restatement (Second) of Torts* § 436A comment b (1965).

In order to accommodate these concerns, the common law developed three tests to limit recovery for negligent infliction of emotional distress.[6] A minority of states applies some version of the "physical impact" test, which allows recovery for negligent infliction of emotional distress only if the plaintiff experiences an actual physical impact that, in turn, causes an emotional injury. A significantly larger number of states and the District of Columbia permit recovery for negligent infliction of emotional distress if the plaintiff either experiences a physical impact or is in the "zone of danger" of a physical impact, that is, if the plaintiff faces a threat of a physical impact

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[6] For the Court's convenience, a compilation of the states that have adopted each of the common law negligent infliction of emotional distress tests appears in the Appendix attached to this Brief.

and reasonably fears for his or her safety as the result of that threat. Finally, another group of states enlarges the zone of danger test in a limited circumstance by allowing a plaintiff to recover damages for emotional distress as the result of contemporaneously witnessing harm to immediate family members from a physical impact, even if the plaintiff, the so-called "bystander," is not personally in the zone of danger of the physical impact.[7]

Contrary to the court of appeals' assertions in *Gottshall* and *Carlisle* that the sole purpose of the common law tests is to weed out fraudulent claims, *see Gottshall*, App. at A-31; *Carlisle*, App. at A-81, all are attempts to curtail the unlimited liability that results from the imposition of a general foreseeability test. In short, the common law tests for negligent infliction of emotional distress define whether a particular defendant owes a particular plaintiff a duty of care. *See Thing v. La Chusa*, 48 Cal. 3d 644, 654 n.3, 771 P.2d 814, 819 n.3, 257 Cal. Rptr. 865, 870 n.3 (1989).

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[7] There are a few state courts that refuse absolutely to recognize a cause of action for the negligent infliction of emotional distress. *See Allen v. Walker*, 569 So. 2d 350 (Ala. 1990); *Mechanics Lumber Co. v. Smith*, 296 Ark. 285, 752 S.W.2d 763 (1988). At the other end of the spectrum, Hawaii has adopted a unique and expansive general foreseeability approach that resembles the approach taken by the court of appeals in these cases. *See, e.g., Rodrigues v. State*, 52 Haw. 156, 472 P.2d 509 (1970); *Campbell v. Animal Quarantine Station*, 63 Haw. 557, 632 P.2d 1066 (1981). In addition, in cases in which there is some special relationship between plaintiff and defendant, as between a patient and his or her doctor, some courts have found a duty owed by the defendant to protect the plaintiff ("the direct victim") from negligent infliction of emotional distress. *See, e.g., Burgess v. Superior Court*, 2 Cal. 4th 1064, 831 P.2d 1197, 9 Cal. Rptr. 2d 615 (1992); *Corgan v. Muehling*, 143 Ill. 2d 296, 574 N.E.2d 602, 158 Ill. Dec. 489 (1991).

An expansive test like that adopted by the court of appeals, in contrast, in which any plaintiff who foreseeably may be harmed emotionally will recover, fails to take into consideration the policy judgments essential to the negligence system. As explained by Dean Prosser:

> There is still the problem of an end to liability, of a place to stop. It is still unthinkable that anyone shall be liable to the end of time for all of the results that follow in endless sequence from his single act. Causation cannot be the answer; in a very real sense the consequences of an act go forward to eternity, and back to the beginning of the world. Any attempt to impose responsibility on such a basis would result in infinite liability for all wrongful acts, which would "set society on edge and fill the courts with endless litigation."

Prosser, *Palsgraf Revisited*, 52 Mich. L. Rev. 1, 24 (1953) (footnote omitted); *see also Thing*, 48 Cal. 3d at 654, 771 P.2d at 819, 257 Cal. Rptr. at 870 (1989) ("policy considerations mandate[] that infinite liability be avoided by restrictions that . . . somehow narrow the class of potential plaintiffs").

By refusing to apply the common law negligent infliction of emotional distress tests, the court of appeals abdicated its judicial responsibility to determine the appropriate boundaries for negligent infliction of emotional distress claims under the FELA. In place of the common law tests, the court applied an *ad hoc* "indicia of genuineness" test and general tort principles to determine liability (A-57). However, in actuality, both the court's *ad hoc* "genuineness" test and its application of general tort principles impose virtually unlimited liability on FELA defendants.

The court of appeals' focus on whether a claim is genuine caused it to abandon all common law limitations on a railroad's duty. However, this focus is improper under a negligence analysis. *Cf.* 3 F. Harper, F. James & D. Gray, *The Law of Torts* § 18.2, at 665 (1986) (discussing duty issue and noting that "if there were ever complete social insurance for bodily injury or disability, however caused, the only questions would be those as to genuineness, or the extent, of the injury, and the like"). A no-fault or insurance statute compensates all genuine job-related injuries suffered by employees, without regard to negligence. The FELA, in contrast, compensates only those genuine job-related injuries suffered by employees that are caused by some breach of duty owed by the employer to the employee. Neither at common law nor under the FELA may a plaintiff recover solely because he or she has genuine injuries.

Moreover, despite discussing well-recognized tort elements of foreseeability, breach of duty, injury, and causation, the court of appeals' general tort analysis in actuality elevates foreseeability over all other elements. *See, e.g., Gottshall*, App. at A-51 ("the precipitating event triggering Gottshall's injury was foreseeable"); *id.* at A-54 (genuine issue whether Conrail breached duty of care because Gottshall's injury could be found to be foreseeable); *id.* at A-57 (breach of duty arises from "an act or omission creating a foreseeable risk"). Indeed, in *Carlisle*, the court concluded that protracted exposure to stressful work conditions could lead to liability under the FELA because the "injurious result was reasonably foreseeable." *Carlisle*, App. at A-87.

The fallacy of utilizing foreseeability as the primary test of liability, however, is that – as the experience of the common law courts teaches – foreseeability places no

limits at all on a defendant's liability. *Cf. Gaston*, 866 F.2d at 820 (expansion of liability to bystanders for emotional injury would create "random and wayward" consequences that would multiply "damages incalculably on the basis of factors which are entirely incidental to the operation of the train or vessel and which bear little or no relationship to the safety of that venture").

Thus, the court in *Gottshall* concluded that it was foreseeable that Gottshall would experience an emotional injury because he saw his friend die and because he labored under the same working conditions as his friend. Under the court's reasoning, it surely is no less foreseeable that other men on Gottshall's crew – or even men on other Conrail crews hearing of Johns' death – also would suffer emotional injuries because of the hard labor that their jobs required them to perform on a hot day. Similarly, Carlisle's principal evidence of stress consisted of his and other employees' complaints and of two reports detailing the stress of a train dispatcher's job. It is no less foreseeable that any Conrail dispatcher would suffer stress from the demands of the position. It is because of this very real potential for unlimited liability that the common law courts place the limits on recovery for negligent infliction of emotional distress that the court of appeals here rejected.

Indeed, there exists a diversity of psychological make-ups among railroad employees, just as among the general population, and different people inevitably will react to the same events in different ways. *See* Testimony of plaintiff's expert, Dr. Bernard Albert, at 178 (CR-757) (testifying that people react to different levels of stress and different kinds of stress in different ways); Testimony of plaintiff's expert, Dr. Lawrence Real, at 29-30 (CR-813 to CR-814) (testifying that Carlisle might be among the

twenty percent of the population that is genetically vulnerable to major depression). Under the court of appeals' approach, railroad employers will be forced to conform their conduct to the possible reaction of the most emotionally fragile of their employees, a result explicitly rejected at common law. *See, e.g., Caputzal v. Lindsay Co.*, 48 N.J. 69, 76, 222 A.2d 513, 517 (1966); *Williamson v. Bennett*, 251 N.C. 498, 505, 112 S.E.2d 48, 53 (1960).

For these reasons, with but few exceptions, federal courts that have considered the issue have determined that stress caused by ordinary working conditions cannot support a recovery under the FELA. *See, e.g., Lancaster v. Norfolk & W. Ry.*, 773 F.2d 807, 813 (7th Cir. 1985) (a claim for "too much – not too dangerous – work . . . is not our idea of an FELA claim"), *cert. denied*, 480 U.S. 945 (1987); *see also Puthe*, 2 F.3d at 483-84; *Elliott v. Norfolk & W. Ry.*, 910 F.2d 1224, 1229-30 (4th Cir. 1990); *Adams v. CSX Transp., Inc.*, 899 F.2d 536, 539-40 (6th Cir. 1990); *Stoklosa v. Consolidated Rail Corp.*, 864 F.2d 425, 426 (6th Cir. 1988).

The breadth of the court of appeals' holding is further evident from the fact that in all likelihood, Gottshall and Carlisle could not recover under many workers' compensation systems, which, unlike the FELA, are no-fault systems. While it is difficult to generalize about workers' compensation recoveries for mental stress because of the variety of approaches taken by the states, one widely-accepted test – and the one advocated by the leading commentator in the workers' compensation field – is that work stresses should be compensable if such stresses are "sufficiently more damaging than those of everyday employment life." 1B A. Larson, *The Law of Workmen's Compensation* § 42.23(b), at 7-923 (1993).

Applying this test, a number of courts refuse to award workers' compensation to employees who allege

mental injuries arising from the normal stresses of their high stress jobs because such stress simply is not an abnormal working condition. *See, e.g., Sloss v. Industrial Comm'n*, 121 Ariz. 10, 11, 588 P.2d 303, 304 (1978); *Chicago Bd. of Educ. v. Industrial Comm'n*, 169 Ill. App. 3d 459, 467-68, 523 N.E.2d 912, 918, 120 Ill. Dec. 1, 7, *appeal denied*, 122 Ill. 2d 571, 530 N.E.2d 241, 125 Ill. Dec. 213 (1988); *Jensen v. New Mexico State Police*, 109 N.M. 626, 629-30, 788 P.2d 382, 385-86 (Ct. App.), *cert. denied*, 109 N.M. 563, 787 P.2d 1246 (1990); *Jackson v. Liberty Mut. Ins. Co.*, 580 S.W.2d 70, 71 (Tex. Ct. App. 1979).

As one court explained:

> If we allowed workers to recover for long-term mental injuries when those injuries were triggered by everyday work stress, then almost all mental injuries would be compensable from the worker's compensation fund. There are very few workers with nontraumatic mental problems who cannot show that job stress contributed to their problems. The employers would become insurers for almost all mental illnesses suffered by their employees.

Graves v. Utah Power & Light Co., 713 P.2d 187, 192 (Wyo. 1986).

In sum, therefore, the court of appeals' expansive test has no basis in the common law tort of negligent infliction of emotional distress, the negligence standard of the FELA, or the FELA's purpose to address the unusual physical dangers of the railroad industry. Indeed, the court of appeals' decisions in *Gottshall* and *Carlisle* are wholly inconsistent with these well-established principles of FELA jurisprudence.

B. The Court of Appeals' Expansive Test Allows Liability Under the FELA for Matters Involving a Railroad Employee's General Working Conditions That More Properly Are Addressed Under the Railway Labor Act.

The court of appeals' opinions in *Gottshall* and *Carlisle* open the door to liability for general work stresses and routine management decisions. They pose the precise threat to the RLA legislative scheme to which this Court was sensitive in *Buell*. The specific question decided in *Buell* was whether a railroad worker's remedy before the National Railroad Adjustment Board ("NRAB") pursuant to the RLA, 45 U.S.C. § 151 *et seq.*,[9] precluded the railroad worker's claim for emotional injuries arising from intentional harassment, threats, and intimidation inflicted by his supervisors and co-workers pursuant to the FELA.

In *Buell*, the district court held that the plaintiff's claim for emotional injuries was a minor dispute under

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[9] The RLA establishes elaborate administrative procedures to resolve both major and minor disputes between railroad employees and their employers. Major disputes are those arising "out of the formation or change of collective bargaining agreements covering rates of pay, rules or working conditions." *Detroit & Toledo Shore Line R.R. v. Transportation Union*, 396 U.S. 142, 145 n.7 (1969). Minor disputes are those that "grow out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." *Buell*, 480 U.S. at 563; *see also Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 307 (1989). Minor disputes in the railroad industry are subject to binding and compulsory arbitration before either a national adjustment board, 45 U.S.C. § 153 First, or before an adjustment board established by both the employer and the union representing the employee, *id.* § 153 Second. The adjustment boards have exclusive jurisdiction over minor disputes. *Consolidated Rail Corp.*, 491 U.S. at 303-04.

the RLA and therefore subject to the exclusive jurisdiction of the NRAB. The Court of Appeals for the Ninth Circuit reversed the district court, holding that Buell's claim of intentional harassment was not a "minor dispute" within the exclusive jurisdiction of the NRAB. *Buell*, 480 U.S. at 560. This Court affirmed on the jurisdictional issue, explaining that "absent an intolerable conflict between the two statutes [the FELA and the RLA], we are unwilling to read the RLA as repealing any part of the FELA." *Id.* at 566-67.

In response to an argument raised by an *amicus*, the Association of American Railroads, that a large portion of the 183,800 grievances filed under the auspices of the RLA in 1985 would be pursued as FELA actions instead were this Court to rule as ultimately it did in *Buell*, the Court remarked that "[t]his parade of horribles mistakenly assumes that a significant percentage of employees bringing grievances suffer the type of *severe emotional injury* that has generally been required to establish liability for purely emotional injury . . . and that a significant percentage of employees are subject to the type of *unconscionable abuse* which is a prerequisite for recovery." *Id.* at 566 n.13 (emphasis added). *See also Farmer v. United Bhd. of Carpenters, Local 25*, 430 U.S. 290, 305-06 (1977) (cited in *Buell*).

Thus, while *Buell* held that recognition of the plaintiff's claims of intentional harassment would not interfere with the legislative scheme of the RLA, it did not hold that *any* claim for emotional distress pled by *any* plaintiff would be cognizable. To the contrary, there might be some FELA cases that create "an intolerable conflict" between the RLA and the FELA and in such cases the

FELA's scope should be construed so as not to encroach upon the legislative scheme established by the RLA.

These are just such cases. As Judge Roth correctly noted in her dissent, aside from knocking out the radio relay, all of Gottshall's allegations consist of "the negotiated circumstances of the duties of this work crew" (A-69). Similarly, Carlisle's complaint was that Conrail gave him too much work to perform and outdated equipment with which to perform it.

Unlike the claims of intentional conduct arising from the harassment in *Buell*, claims of negligent conduct arising from the negotiated circumstances of an employee's job simply are not the type of claims that should be cognizable in an FELA action for negligent infliction of emotional distress. There is reason to make *intentional* conduct such as that alleged in *Buell* not subject to the exclusive remedies of the RLA because such "extreme and outrageous conduct," *Restatement (Second) of Torts* § 46 (1965), generally is not the subject of collective bargaining. However, this rationale evaporates when it comes to *negligent* conduct involving working conditions that have been set by collective bargaining between the employer and its employees.

If employees are unhappy with working conditions, the appropriate way to address such conditions is through negotiation, dispute resolution, and collective bargaining between the railroad and its employees as a group, not as a broad-based tort action between the railroad and an individual employee. Indeed, the RLA is a comprehensive legislative scheme to resolve labor disputes in the railroad industry. *Buell*, 480 U.S. at 562; *see also Melanson v. United Air Lines*, 931 F.2d 558, 561 (9th Cir.), *cert. denied*, 112 S. Ct. 189 (1991); *cf. Holliday v.*

Consolidated Rail Corp., 914 F.2d 421, 424 (3d Cir. 1990) ("As work rules and working conditions represent issues that are at the heart of labor-management negotiations, the court will not upset the delicate balance of the collective bargaining agreement absent a . . . compelling reason."), *cert. denied*, 498 U.S. 1090 (1991).[10]

The court of appeals in *Gottshall* and *Carlisle*, however, created a cause of action that in effect transfers the responsibility for establishing working conditions from the arena of employee-management negotiation, dispute resolution, and collective bargaining to private lawsuits between individual employees and the employer. It ignored the availability of the RLA to employees subjected to stressful working conditions and developed an expansive test of liability that inevitably will encroach upon matters that Congress committed to the RLA.

[10] Both before and after *Buell*, the lower federal courts have observed the "somewhat blurry line between the RLA and the FELA." *Kulavic v. Chicago & Illinois Midland Ry.*, 1 F.3d 507, 520 (7th Cir. 1993) (Flaum, J., concurring); *see also Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045, 1051 (7th Cir. 1983) (noting the tension between the FELA and the RLA), *cert. denied*, 465 U.S. 1007 (1984); *Lewy v. Southern Pac. Transp. Co.*, 799 F.2d 1281, 1288 n.5 (9th Cir. 1986) (considering the preclusive effect of the RLA as "critical in determining the scope of the FELA's coverage"); *Feldleit v. Long Island R.R.*, 723 F. Supp. 892, 900-01 (E.D.N.Y. 1989). Given the undeniable interaction between the two statutes, "where the RLA is involved, there is good reason to construe the FELA to exclude non-physical injuries of the kind claimed here as a predicate for emotional harm." *Milam v. Herrlin*, 819 F. Supp. 295, 303 (S.D.N.Y. 1993).

C. The Court of Appeals' Expansive Test Allows a Broader Recovery for Negligent Infliction of Emotional Distress Under the FELA Than That Allowed by Any Other Court of Appeals to Have Considered the Issue.

Since this Court's decision in *Buell*, every court of appeals to have addressed the question of what circumstances may give rise to a cause of action for negligent infliction of emotional distress under the FELA – with the exception of the court of appeals in *Gottshall* and *Carlisle* – has placed limits on such claims consistent with the FELA and the common law.

Some courts of appeals have required the plaintiff to have experienced a physical impact or to be in the zone of danger of a physical impact. *See, e.g., Ray v. Consolidated Rail Corp.*, 938 F.2d 704, 705 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 914 (1992); *Hammond v. Terminal R.R. Ass'n*, 848 F.2d 95, 96 (7th Cir. 1988), *cert. denied*, 489 U.S. 1032 (1989); *see also Plaisance v. Texaco, Inc.*, 966 F.2d 166, 168-69 (5th Cir.) (*en banc*), *cert. denied*, 113 S. Ct. 604 (1992); *Gaston*, 866 F.2d at 819-20.[11]

Other courts of appeals have avoided the issue of the legal standard to be applied in determining what circumstances may give rise to a cause of action for negligent infliction of emotional distress under the FELA by holding that on the facts of the particular case the emotional

[11] Prior to its decisions in *Gottshall* and *Carlisle*, the Court of Appeals for the Third Circuit also appeared to favor the zone of danger test for negligent infliction of emotional distress under the FELA. *See Holliday v. Consolidated Rail Corp.*, 914 F.2d 421 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 970 (1991); *Outten v. National R.R. Passenger Corp.*, 928 F.2d 74 (3d Cir. 1991).

injury resulting from ordinary working conditions was not actionable. *See, e.g., Moody v. Maine Cent. R.R.*, 823 F.2d 693, 694 (1st Cir. 1987) ("We see the *Buell* opinion [as] an attempt to leave the door to recovery for emotional injury somewhat ajar but not by any means wide open"); *see also Puthe*, 2 F.3d at 483; *Stoklosa*, 864 F.2d at 426; *Robert v. Consolidated Rail Corp.*, 832 F.2d 3, 6 (1st Cir. 1987).

Yet other courts of appeals, relying on the language in *Buell* with regard to "severe emotional injury" and "unconscionable abuse," *Buell*, 480 U.S. at 566 n.13, have imposed significant limitations on recovery for claims of negligent infliction of emotional distress under the FELA by requiring "outrageous" or "unconscionable" conduct. *See, e.g., Elliot*, 910 F.2d at 1229; *Adams*, 899 F.2d at 539-40.[12]

* * *

In sum, the broad remedial policy of the FELA does not justify allowing recovery under the FELA for every "genuine," "foreseeable" emotional injury. To the contrary, as discussed below, both the policies of the FELA and those of the common law accord with limiting recovery for negligent infliction of emotional distress under

[12] It is not clear what limits the Court of Appeals for the Ninth Circuit, the final court of appeals to have discussed the FELA negligent infliction of emotional distress issue, would place on such cause of action. While the Ninth Circuit Court of Appeals has acknowledged that FELA claims for mental injuries are compensable, it has not delineated the specific circumstances under which the recovery of damages is permitted. *See Taylor v. Burlington N. R.R.*, 787 F.2d 1309, 1313 (9th Cir. 1986); *see also Pierce v. Southern Pac. Transp. Co.*, 823 F.2d 1366, 1372 n.2 (9th Cir. 1987).

the FELA to circumstances in which the plaintiff experiences a physical impact or reasonably fears the threat of physical impact.

II. LIMITING RECOVERY FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS UNDER THE FELA TO SITUATIONS IN WHICH THE PLAINTIFF EXPERIENCES A PHYSICAL IMPACT OR REASONABLY FEARS THE THREAT OF A PHYSICAL IMPACT STRIKES THE MOST APPROPRIATE BALANCE AMONG THE VARIOUS POLICIES AND INTERESTS AT STAKE.

As discussed *supra* pp. 20-21, because emotional distress claims are different from tort claims involving only physical injury, the common law imposes one of the following three threshold requirements on recovery for negligent infliction of emotional distress: (1) that the plaintiff experience an actual physical impact; (2) that the plaintiff either experience an actual physical impact or reasonably fear the threat of being in the zone of danger of an actual physical impact; or (3) that the plaintiff contemporaneously witness harm to an immediate family member.[13] Although any one of these three standards is preferable to the unlimited foreseeability test adopted by

[13] Once one of these threshold requirements is met, the general physical injury tort requirements of breach of duty, injury, and causation still must be satisfied. In the emotional distress context, "injury" includes some objective physical manifestation of the emotional distress. *See* Comment, *Negligent Infliction of Mental Distress: A Jurisdictional Survey of Existing Limitation Devices and Proposal Based on an Analysis of Objective Versus Subjective Indices of Distress*, 33 Vill. L. Rev. 781, 796-99 (1988).

the court of appeals in these cases, the zone of danger test strikes the most appropriate balance among the various policies at issue and is the fairest and most workable of the common law tests.

A. The Zone of Danger Test Is the Common Law Test That Is Most Consistent With the FELA.

While the FELA speaks in general terms, and leaves room for interpretation by the courts, *Kernan v. American Dredging Co.*, 355 U.S. 426, 432 (1958), it nonetheless represents a careful balance between modified common law doctrines and new statutory remedies. Congress granted remedies under the FELA to certain classes of workers while modifying several traditional common law doctrines, including the fellow servant rule, contributory negligence, assumption of risk, and contractual waiver of liability. *See* 45 U.S.C. §§ 51, 53-55; *see also* H.R. Rep. No. 1386, 60th Cong., 1st Sess. 1 (1908); R. Dahlquist, *Punitive Damages Under the Jones Act*, 6 Mar. Law. 1, 32 (1981) (citing W. Prosser, *The Law of Torts* 535-36 (4th ed. 1971)).

Any standard for negligent infliction of emotional distress claims should not upset this balance. This Court long has recognized the problems inherent in dealing with remedial statutory schemes in which Congress has balanced the interests of employees, employers, and the public. In *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), a decision concerning a claim for contribution among joint tortfeasors under the Longshoremen's and Harbor Workers' Act, this Court "took cognizance of the apparent trade-off in the Act between the employer's limitation of liability and the abrogation, in favor of the employee, of common-law doctrines of

contributory negligence and assumption of risk." *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 112 (1974) (discussing *Halcyon*). The Court refrained from allowing contribution because "any workable rule of contribution might be inconsistent with the balance struck by Congress in the Harbor Workers' Act between the interests of carriers, employers, employees, and their respective insurers." *Id.*; *see also Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990).

Any cause of action for negligent infliction of emotional distress must be consistent with the congressional scheme of the FELA.[14] In this respect, the common law zone of danger test – the middle-ground test – is the most appropriate.

In contrast to the expansive approach adopted by the court of appeals, which is completely divorced from the congressional concern with physical injury and death, the common law zone of danger test – with its requirement of physical impact or a reasonable fear of the threat of physical impact – is most consistent with Congress' concern with physical injury. *See Lancaster*, 773 F.2d at 813 (adopting zone of danger test because of FELA's concern "with the security of the person from physical invasions or menaces"), *cert. denied*, 480 U.S. 945 (1987).

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[14] Caution is especially in order before the balance is upset, given that Congress has considered repeal or amendment of the FELA. *See Hearings on the Federal Employers' Liability Act Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. (1989); *see also* 136 Cong. Rec. S15553 (daily ed. Oct. 17, 1990) (proposed legislation to repeal FELA and place the railroad industry under the jurisdiction of state workers' compensation systems); 136 Cong. Rec. H10104 (daily ed. Oct. 17, 1990) (same).

A zone of danger test also is consistent with the realities of the railroad industry. As discussed, *supra* pp. 18-19, the railroad industry, like the shipping industry, by its very nature is a rigorous, physically demanding, round-the-clock, all-weather industry – not for the "faint-hearted." *Gaston*, 866 F.2d at 820. The court of appeals' test improperly permits a cause of action for the ordinary stresses of a railroad worker's chosen career, whereas the zone of danger test does not. Moreover, as discussed, *supra* pp. 27-30, the workers subjected to stress from ordinary working conditions are not without remedy. They have available to them the comprehensive arbitration and collective bargaining system of the RLA as the more appropriate forum to address working conditions that give rise to stress.

On the other hand, when a railroad worker experiences a physical impact or reasonably fears the threat of a physical impact, the zone of danger test permits a recovery. It thus provides the necessary link between the type of physical injury contemplated by Congress in enacting the FELA, the legislative system embodied in the RLA, and the development of the tort of negligent infliction of emotional distress at common law.

The experience of the Court of Appeals for the Fifth Circuit is instructive. In *Gaston*, 866 F.2d at 817, the court affirmed the dismissal of Gaston's negligent infliction of emotional distress claim based on having witnessed the violent death of his half-brother. While recognizing the tragic quality of Gaston's experience, it concluded that to allow recovery for emotional distress to a bystander not himself physically endangered by the traumatic event

would randomly and incalculably expand liability without any corresponding increase in safety because damages would be measured by:

> factors which are entirely incidental to the operation of the train or vessel and which bear little or no relationship to the safety of that venture – factors such as how many crew members happen to be standing around to observe an incident, whether their vision is obscured by darkness or weather, how close they are to the occurrence, and the like. Because they are irrelevant to that operation, visiting exponential damages on an employer on the basis of such factors is not only random and wayward, but serves in no way to advance the major subsidiary purpose of affording such remedies as those of the FELA/Jones Act to trainmen and seamen: to hold out incentives to their employers to reduce dangers and operate safely.

Gaston, 866 F.2d at 820.

In *Plaisance v. Texaco, Inc.*, 937 F.2d 1004 (5th Cir. 1991), *on rehearing*, 966 F.2d 166 (5th Cir.) (*en banc*), *cert. denied*, 113 S. Ct. 604 (1992), an experienced tugboat captain who witnessed an explosion when a barge ruptured a pipeline brought suit under the Jones Act for emotional distress. The panel adopted what it termed a "full recovery" approach – similar to the approach taken in *Gottshall* and *Carlisle* – that would permit a plaintiff to recover for negligent infliction of emotional distress if a reasonable person, normally constituted, would not have been able to cope adequately with the mental distress arising from the circumstances. *Plaisance*, 937 F.2d at 1010. The panel denied recovery to the particular plaintiff, however. *Id.* at 1011.

On rehearing, the *en banc* court concluded that because the plaintiff's claim was not cognizable under even the most liberal "full recovery" theory, the panel should not have reached the issue of whether foreseeability alone could support a recovery for negligent infliction of emotional distress. *Plaisance*, 966 F.2d at 168. Significantly, the *en banc* court emphasized that *Gaston*, with its suggestion that the zone of danger test is the appropriate test for negligent infliction of emotional distress, remained the law of the circuit. *Id.* at 169.

Thus, as the Fifth Circuit's experience illustrates, FELA policy most accords with limiting recovery for negligent infliction of emotional distress to situations in which the plaintiff either experiences a physical impact or reasonably fears the threat of a physical impact. As discussed below, the development of the common law supports the same result.

B. The Development of the Common Law Demonstrates That the Zone of Danger Test Is the Fairest and Most Workable of the Common Law Tests.

At common law, the zone of danger test is the most workable approach to the recovery of damages for negligent infliction of emotional distress. No other approach has proven to be as fair, as administratively efficient, or as consistent in application.

Although the physical impact test may best recognize Congress' original concern with the physical dangers of railroad employment, that test generally has been abandoned at common law in recognition that a near miss may be as frightening as an actual impact. *See* Appendix to Brief (citing only six states that retain the impact rule).

At the other end of the common law spectrum, the bystander test not only is particularly ill-suited to the railroad context, but also has proven to be arbitrary and unworkable. In *Dillon v. Legg*, 68 Cal. 2d 728, 741, 441 P.2d 912, 921, 69 Cal. Rptr. 72, 81 (1968), the Supreme Court of California held that a mother could recover for the emotional distress of witnessing injury to her child because an emotional injury to the mother from such an event was reasonably foreseeable. The court suggested three guidelines for future cases in gauging the boundaries of foreseeability as a limit on a defendant's duty: (1) whether the plaintiff was located near the scene of the accident, or was a distance away from it; (2) whether the shock resulted from a direct emotional impact upon the plaintiff caused by sensory and contemporaneous observation of the accident, as opposed to learning of the accident from others after its occurrence; and (3) whether the plaintiff and the victim were closely related, or were either unrelated or only distantly related. *Dillon*, 68 Cal.2d at 790-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.

In the years following *Dillon*, realizing that the three factors enumerated in *Dillon* in no way encompass all situations in which emotional distress is foreseeable, the California courts relaxed the *Dillon* requirements. *See, e.g., Ledger v. Tippitt*, 164 Cal. App. 3d 625, 646, 210 Cal. Rptr. 814, 826 (1985) (abandoning requirement of blood or marital relationship to allow recovery for negligent infliction of emotional distress to unmarried co-habitant); *Archibald v. Braverman*, 275 Cal. App. 2d 253, 255, 79 Cal. Rptr. 723, 724-25 (1969) (allowing mother who arrived after injury-producing event occurred to recover for emotional distress).

In 1989, however, the Supreme Court of California recognized that the California decisions were leading to a situation of unlimited liability – " 'foreseeability is endless because . . . like light, [it] travels indefinitely in a vacuum.' " *Thing v. La Chusa*, 48 Cal. 3d 644, 659, 771 P.2d 814, 823, 257 Cal. Rptr. 865, 874 (1989) (quoting *Newton v. Kaiser Foundation Hosps.*, 184 Cal. App. 3d 386, 391, 228 Cal. Rptr. 890, 893 (1986)). To limit a defendant's liability, the *Thing* court instructed the lower courts to impose *Dillon*'s requirements strictly – even if arbitrarily – and noted that "there are clear judicial days on which a court can foresee forever and thus determine liability but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for that injury." *Thing*, 48 Cal. 3d at 668, 771 P.2d at 829-830, 257 Cal. Rptr. at 881.[15]

Indeed, as the Supreme Court of New York explained in adopting the zone of danger test instead of the relative bystander approach endorsed in *Dillon*:

> [W]hichever way one turns in permitting a theory of recovery one is entangled in the inevitable ramifications which will not stay defined or limited. There are too many factors and each too relative to permit creation of only a limited scope of liability or duty.
>
> . . . Every injury has ramifying consequences, like the ripplings of the waters, without end. The problem for the law is to limit the legal

[15] Like California, other state courts that have moved towards a general foreseeability test subsequently have retreated from that approach. *See, e.g., Cameron v. Pepin*, 610 A.2d 279 (Me. 1992); *Gain v. Carroll Mill Co.*, 114 Wash. 2d 254, 787 P.2d 553 (1990).

> consequences of wrongs to a controllable degree.

Tobin v. Grossman, 24 N.Y.2d 609, 619, 249 N.E.2d 419, 424, 301 N.Y.S.2d 554, 561 (1969).

Thus, the development of the common law teaches that tests based on foreseeability, such as the bystander test, inevitably lead to potentially unlimited and irrational liability for the defendant. Even for plaintiffs, foreseeability tests prove to be as arbitrary as any other common law test. As demonstrated by the experience of Hawaii, which adopted a general foreseeability test, *Rodrigues v. State*, 52 Haw. 156, 472 P.2d 509 (1970), there always will be situations in which emotional harm is foreseeable, but the court nonetheless must step in to limit liability. *See, e.g., Kelley v. Kokua Sales & Supply Ltd.*, 56 Haw. 204, 208, 532 P.2d 673, 676 (1975) (denying recovery to plaintiff where emotional injury was serious and foreseeable but so far removed from the injury-producing event that "[w]ithout a reasonable and proper limitation of the scope of the duty of care owed by" defendants, defendants "would be confronted with an unmanageable, unbearable and totally unpredictable liability").

The zone of danger test best reconciles the interests of emotionally injured plaintiffs, defendants, and judicial efficiency. It is also fairer than a bystander or foreseeability test because it recognizes that the principal purpose of a negligence analysis is to avoid the imposition of liability out of all proportion to a defendant's fault. *See, e.g., Williams v. Baker*, 572 A.2d 1062, 1072 (D.C. 1990); *Rickey v. Chicago Transit Auth.*, 98 Ill. 2d 546, 554, 457 N.E.2d 1, 4, 75 Ill. Dec. 211, 214 (1983); *Stadler v. Cross*, 295 N.W.2d 552, 554 (Minn. 1980).

Moreover, the zone of danger test is consistent with an underlying premise of the negligence system that it is both meaningless and unfair to impose liability when the defendant could not have taken precautions to avoid injury. *See United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). Although foreseeability may be a good indicator of the need for precautions in cases involving tangible physical injury, it is a very poor indicator with respect to intangible emotional injuries where it is impossible for the defendant to estimate possible injuries and make any assessment of damages. *See* Pearson, *Liability to Bystanders for Negligently Inflected Emotional Harm – A Comment on the Nature of Arbitrary Rules*, 34 U. Fla. L. Rev. 477, 507 (1982). As a result, it is unlikely that the imposition of a duty to protect against foreseeable emotional distress would have any effect in deterring dangerous and unsafe conduct. *Cf. Gaston*, 866 F.2d at 820 (the random effects of imposing bystander liability in the context of the FELA would in no way advance railroad safety).

C. Neither Gottshall Nor Carlisle Has a Compensable Injury Under the FELA Because Neither Experienced a Physical Impact or Reasonably Feared the Threat of a Physical Impact.

In these cases, neither Gottshall nor Carlisle falls within the contours of liability for negligent infliction of emotional distress as those contours should be drawn under the FELA.

Even if it is assumed that Gottshall's emotional distress is genuine and is a foreseeable consequence of the circumstances surrounding John's death, Gottshall himself suffered no physical impact from those circumstances nor was he in danger of any physical impact. Laboring

alongside a colleague who suffers a heart attack while working under time pressure on an unusually hot day simply does not trigger liability under a zone of danger analysis. Nor should it state a cause of action under the FELA.

Similarly, even if it is assumed that Carlisle's emotional distress is genuine and is a foreseeable consequence of his working conditions, Carlisle suffered no physical impact and was not within the zone of danger of any physical impact. General stress resulting from long hours, a difficult and demanding job, and unsophisticated office equipment also does not trigger liability under a zone of danger analysis. It, too, should not state a cause of action under the FELA.

Application of the zone of danger test admittedly means that some employees who suffer genuine emotional distress, like Gottshall and Carlisle, may not be able to recover under the FELA. On the other hand, for all the reasons discussed in this Brief, limiting recovery for negligent infliction of emotional distress to situations in which the plaintiff experiences a physical impact or reasonably fears the threat of a physical impact strikes the most appropriate balance among the various policies and interests at stake.

CONCLUSION

For the foregoing reasons, petitioner Consolidated Rail Corporation respectfully requests that, as to *Consolidated Rail Corporation v. Gottshall*, this Court reverse the judgment of the Court of Appeals for the Third Circuit and remand with instructions to affirm the district court's

entry of summary judgment for Conrail; and, as to *Consolidated Rail Corp. v. Carlisle*, this Court reverse the judgment of the Court of Appeals for the Third Circuit and remand with instructions for the court of appeals to remand to the district court with instructions to enter judgment as a matter of law for Conrail.

Respectfully submitted,

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APPENDIX

Common Law Negligent Infliction of Emotional Distress Cases

The following is a compilation of the states' common law tests for negligent infliction of emotional distress. Note that in most instances the states that have adopted the more expansive tests also apply the more restrictive tests in appropriate circumstances. For example, many of the states that allow recovery under the bystander test also allow recovery under the zone of danger test.

Physical Impact Test

Georgia: *OB-GYN Assocs., P.C. v. Littleton*, 259 Ga. 663, 386 S.E.2d 146 (1989).

Indiana: *Shuamber v. Henderson*, 579 N.E.2d 452 (Ind. 1991).

Kansas: *Bowman v. Doherty*, 235 Kan. 870, 686 P.2d 112 (1984).

Kentucky: *Mitchell v. Hadl*, 816 S.W.2d 183 (Ky. 1991).

Oregon: *Hammond v. Central Lane Communications Ctr.*, 312 Or. 17, 816 P.2d 593 (1991).

Tennessee: *Laxton v. Orkin Exterminating Co.*, 639 S.W.2d 431 (Tenn. 1982).

Zone of Danger Test

Arizona: *Keck v. Jackson*, 122 Ariz. 114, 593 P.2d 668 (1979).

Colorado: *Towns v. Anderson*, 195 Colo. 517, 579 P.2d 1163 (1978).

Delaware: *Robb v. Pennsylvania R.R.*, 210 A.2d 709 (Del. 1965).

District of Columbia: *Williams v. Baker*, 572 A.2d 1062 (D.C. 1990).

Illinois: *Rickey v. Chicago Transit Auth.*, 98 Ill. 2d 546, 457 N.E.2d 1, 75 Ill. Dec. 211 (1983).

Maryland: *Resavage v. Davies*, 199 Md. 479, 86 A.2d 879 (1952).

Minnesota: *Garvis v. Employers Mut. Casualty Co.*, 497 N.W.2d 254 (Minn. 1993).

Missouri: *Asaro v. Cardinal Glennon Memorial Hosp.*, 799 S.W.2d 595 (Mo. 1990).

New York: *Tobin v. Grossman*, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969).

North Dakota: *Whetham v. Bismarck Hosp.*, 197 N.W.2d 678 (1972).

Utah: *Boucher v. Dixie Medical Ctr.*, 850 P.2d 1179 (Utah 1992).

Vermont: *Jobin v. McQuillen*, 609 A.2d 990 (Vt. 1992).

Wisconsin: *Garrett v. City of New Berlin*, 122 Wis. 2d 223, 362 N.W.2d 137 (1985).

Bystander Test

Alaska: *Croft v. Wicker*, 737 P.2d 789 (Alaska 1987).

California: *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

Florida: *Champion v. Gray*, 478 So. 2d 17 (Fla. 1985).

Iowa: *Fineran v. Pickett*, 465 N.W.2d 662 (Iowa 1991).

Louisiana: *Lejeune v. Rayne Branch Hosp.*, 556 So. 2d 559 (La. 1990).

Maine: *Cameron v. Pepin*, 610 A.2d 279 (Me. 1992).

Massachusetts: *Stockdale v. Bird & Son, Inc.*, 399 Mass. 249, 503 N.E.2d 951 (1987).

Michigan: *Nugent v. Bauermeister*, 195 Mich. App. 158, 489 N.W.2d 148 (1992), *appeal denied*, 503 N.W.2d 904 (1993).

Mississippi: *Entex, Inc. v. McGuire*, 414 So. 2d 437 (Miss. 1982).

Montana: *Maguire v. State*, 254 Mont. 178, 835 P.2d 755 (1992).

Nebraska: *James v. Lieb*, 221 Neb. 47, 375 N.W.2d 109 (1985).

Nevada: *Buck v. Greyhound Lines*, 105 Nev. 756, 783 P.2d 437 (1989).

New Hampshire: *Wilder v. City of Keene*, 131 N.H. 599, 557 A.2d 636 (1989).

New Jersey: *Frame v. Kothari*, 115 N.J. 638, 560 A.2d 676 (1989).

New Mexico: *Folz v. State*, 110 N.M. 457, 797 P.2d 246 (1990).

North Carolina: *Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A.*, 327 N.C. 283, 395 S.E.2d 85 (1990).

Ohio: *Paugh v. Hanks*, 6 Ohio St. 3d 72, 451 N.E.2d 759 (1983).

Pennsylvania: *Sinn v. Burd*, 486 Pa. 146, 404 A.2d 672 (1979).

Rhode Island: *Reilly v. United States*, 547 A.2d 894 (R.I. 1988).

South Carolina: *Kinard v. Augusta Sash & Door Co.*, 286 S.C. 579, 336 S.E.2d 465 (1985).

Texas: *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993).

Washington: *Gain v. Carroll Mill Co.*, 114 Wash. 2d 254, 787 P.2d 553 (1990).

West Virginia: *Heldreth v. Marrs*, 425 S.E.2d 157 (W. Va. 1992).

Wyoming: *Contreras v. Carbon County School Dist. No. 1*, 843 P.2d 589 (Wyo. 1992).